

CONSTRUCTION BILLS: RECENT CHANGES TO CONSTRUCTION LAWS

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The FAST Act: A Federal Long-Term Surface Transportation Law Ten Years in the Making

In early December 2015, President Obama signed the Fixing America's Surface Transportation Act (the "FAST Act"), providing approximately \$305 billion in funding for highway and transit projects over the next five years. This is the first long-term transportation funding law passed in over ten years. The FAST Act is intended to provide funding certainty to critical state and local transportation projects and thereby permit new highway, transit, and freight projects to move forward with confidence in the support of federal funding.

According to Secretary of Transportation Anthony Foxx, "After hundreds of Congressional meetings, two bus tours, visits to 43 states, and so much uncertainty—and 36 short term extensions—it has been a long and bumpy ride to a long term transportation bill. It's not perfect, and there is still more left to do, but it reflects a bipartisan compromise I always knew was possible."¹

According to the Department of Transportation, the FAST Act "largely maintains current program structures and funding shares between highways and transit."² Under the Act more than ninety percent of funding is still distributed to state departments of transportation through set formulas. Local governments may get more direct funding through an increase in "suballocated funds" over the next five years, but metropolitan areas with populations of less than 200,000 will still need to defer to their state department of transportation for funding for projects. The FAST Act does seek to make improvements on

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the current programs, streamlining the approval process for new transportation projects, providing new safety tools, and establishing new programs to advance freight projects.

The Act provides \$225 billion in Highway Trust Fund (HTF) contract authority over the next five years for the Federal-Aid Highway Program, increasing funding from \$41 billion in 2015 to \$47 billion in 2020.³ There is concern that modest increases in funding after years of interim measures will fall far short of addressing the backlog of necessary transportation infrastructure projects around the country. The Department points out that the Act increases transportation funding by eleven percent over the next five years, but is warns that this is far short of the amount necessary to relieve road congestion and keep up with increasing demands on the U.S. transportation system. The eleven percent increase falls far short of the Obama administration's proposal in the GROW AMERICA Act, which proposed to increase funding by forty-five percent.⁴ Other concerns center around how improvements are paid for. The FAST Act does not raise the federal gas tax, currently set at 18.4 cents per gallon. Instead, the primary funding for the bill comes from cleaning up federal accounting practices and possible future sales of oil from the U.S. Strategic Petroleum Reserve.

Below are highlights from the Act. A full copy of the FAST Act is currently available at <http://transportation.house.gov/fast-act/>.

Project Delivery and Design

The FAST Act implements several proposals to expedite the permitting process while balancing the need to protect environmental and historically sensitive areas. For example, the Act creates a pilot program for states with NEPA assignments to substitute their state environmental review laws for NEPA. It also requires lead agencies to establish project schedules for environmental impact statements and assessments in coordination with participating agencies. Currently no project schedule is required. The Act also codifies the online project tracking system and interagency coordination process.

In addition, the Act offers new flexibility for city street design. Before, street design in metro areas using federal funding was required to follow state planning guidelines. Under the Act, city officials have the flexibility to use other manuals approved by the Federal Highway Administration, even if the standards differ from state guidelines.

This could be considered a significant endorsement of the “complete streets” approach set forth in the design manual of the National Association of City Transportation Officials (NACTO). This could free cities to create more bike, pedestrian, and transit friendly facilities in metropolitan areas.

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Freight

The Act places a major emphasis on freight, creating a National Multimodal Freight Network (NMFN) and a dedicated source of federal funding for freight projects through the National Highway Freight Program (NHFP), with particular attention for multimodal projects. The Network includes all interstate highways and 41,000 primary freight network highway miles identified by states and under previous transportation legislation, the Moving Ahead for Progress in the 21st Century Act (MAP-21) (2012). The NHFP will be funded at an average of \$1.2 billion per year, which will be distributed primarily to the states by formula.⁵ All states using formula dollars will also be required to complete a State Freight Plan, either to stand alone or as part of the state’s overall transportation plan.

In addition, the Act creates funding for Nationally Significant Freight and Highway Projects, a discretionary program including approximately \$900 million in funding per year, or \$4.5 billion over the five-year term of the law.⁶ This discretionary program seeks to fund “nationally significant” projects costing more than \$100 million that improve and streamline freight movement, increase competitiveness of U.S. facilities, and increase intermodal connectivity.⁷ The Department of Transportation will award such funding based on statutory criteria.

Finance

A new National Surface Transportation and Innovative Finance Bureau within the Department of Transportation will be a “one-stop shop” for coordination for state and local governments on federal funding, financing, and technical assistance. Building on the Department’s Build America Transportation Investment Center, the new Bureau will provide additional tools to improve coordination across the Department of Transportation and will seek to promote innovative finance mechanisms for

projects. The Bureau will also seek to drive efficiency in the permitting process.

In addition, the FAST Act modifies the Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which offers favorable interest rates to local governments for transportation projects. Under the Act, the threshold for accessing TIFIA funds has been reduced from \$50 million to \$10 million, possibly bringing smaller projects in smaller locales into the program, but the FAST Act also almost quarters the funds available under TIFIA to just \$275 million in fiscal year 2016, and then \$300 million in fiscal years 2019 and 2020, possibly affecting the availability of funds to smaller projects. The Act also makes Transit Oriented Development (TOD), both commercial and residential, eligible for funding under the Act’s highway and rail credit program.

Toll Policy

While current federal law only permits tolling on interstate highways when additional lanes are constructed, the Interstate System Reconstruction and Rehabilitation Pilot Program allows three states—Virginia, Missouri, and North Carolina—to experiment with tolling on existing interstate facilities. As these three states are yet to implement any tolling facilities under the program, the FAST Act seeks to expedite implementation for them by creating an expiration date for their eligibility.⁸ Any new state that comes into the program is required to have legislative authority to implement tolling on an existing facility and such state must complete the project within three years.⁹

Long-Distance Passenger Rail (AMTRAK)

The FAST Act specifically reauthorizes and funds Amtrak intercity passenger rail operations for the five-year duration of the statute. Included in the passenger rail title of the FAST Act is a new pilot program that would allow a public entity, such as a state, or a private operator to bid to operate up to three long-distance routes, up to 750 miles, currently operated by Amtrak. 🚆

Endnotes

1. *The Fixing America’s Surface Transportation Act or “FAST Act,”* TRANSPORTATION.GOV (Jan. 12, 2016), <https://www.transportation.gov/fastact>.

2. *Id.*

3. AM. ASS’N OF STATE HIGHWAY & TRANSP. OFFICIALS, AASHTO SUMMARY OF THE NEW SURFACE TRANSPORTATION BILL: FIXING AMERICA’S SURFACE TRANSPORTATION (FAST) ACT (Dec. 16, 2015), <http://fast.transportation.org/Documents/AASHTO%20Summary%20of%20FAST%20Act%202015-12-16%20FINAL%20v2.pdf>.

4. *Fixing America’s Surface Transportation Act, supra* note 1.

5. *Id.*

6. *Id.*

7. David Narefsky, *How The FAST Act Will Benefit Public-Private Partnership*, LAW360 (Dec. 15, 2015), <http://www.law360.com/articles/736145/how-the-fast-act-will-benefit-public-private-partnership>.

8. *Id.*

9. *Id.*